

NTSB Order No. EA-3933

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of July, 1993

Respondent .

Docket SE-10504

6009

Airlines Flight 42 on January 30, 1988, was careless in his operation of the aircraft, in violation of section 91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91,² as a result of damage which was sustained when the DC-10 aircraft's tail struck the runway on landing at Los Angeles International Airport. The Administrator waived the sanction as a result of respondent's timely filing of a report under the provisions of the Aviation Safety Reporting Program.

Respondent, who was the non-flying pilot at the time of the landing, contends on appeal that the law judge erred in sustaining the Administrator's order, because the Administrator failed to produce any evidence that he was careless. The Administrator has filed a brief in reply, urging the Board to deny the appeal and affirm the law judge's initial decision.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order. For the reasons that follow, we will deny respondent's appeal.

Respondent claims that the evidence establishes only the carelessness of the First Officer, who was manipulating the controls at the time of the landing. He argues that to affirm

²FAR § 91.9 [now recodified as section 91.13(a)] provided at the time of the incident as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

the Administrator's order,³ merely because of his status as pilot-in-command of the aircraft, would require the application of a strict liability standard. We reject respondent's argument.

He relies on a faulty recitation of facts and faulty legal analysis.⁴ In our view, there is ample evidence in the record to support the law judge's finding that respondent failed to exercise his responsibilities and take action which would have prevented this mishap.

According to respondent's written statement of the incident, he was monitoring the instruments and making altitude callouts during what he considered to be a normal approach to landing. As he made the ten-foot callout, he glanced at the attitude director indicator [ADI] and noticed a pitch attitude of 9 to 10 degrees.

At the hearing, respondent characterized a pitch attitude of 9°-10° during a landing with a 50° flap setting as "at the upper

³The First Officer was also the subject of an enforcement action.

⁴Respondent argues that this action is "essentially predicated on an effort by the FAA to overcome the lack of evidence by extending and expanding the so-called Lindstam doctrine by imputing a regulatory violation to Captain Morris." This argument is fallacious. Consistent with Administrator v. Lindstam, 41 C.A.B. 841 (1964), the Administrator's order in this case charged a 91.9 violation without alleging a specific act of carelessness. See e.g., Administrator v. Williams, NTSB Order No. EA-3588, at 3, n. 4 (1992). The Administrator is not relying on the Lindstam doctrine to "impute" carelessness to respondent, nor does he claim that a strict liability standard should be applied to respondent. This procedural device merely allows the Administrator to establish a particular respondent's carelessness from the entire record, rather than requiring him to produce all the evidence in his case-in-chief, since the facts surrounding the incident are typically within the exclusive knowledge of the pilot(s).

limits, and would not describe it as "normal" (TR-136).⁵ He admits that after noting the ADI, he placed his hand, open palm, on the center of the yoke, "with intent of forward pressure." (Exhibit C-4).⁶ Seconds later, on touchdown, the spoilers automatically deployed. As a result, the pitch attitude increased, and the tail struck the runway.

The Administrator's expert witnesses testified that, while respondent properly moved his hand to the center of the yoke, the tail strike could have been avoided had he then "caught" the yoke to prevent any further pitch up, or had he pushed forward, when the spoilers extended. (Testimony of Inspector Hutsell, TR 49 and 62). According to FAA Inspector Chemello, respondent should have exerted enough physical effort to keep the yoke from coming back any further. (TR-87). When respondent placed his hand, open palm, on the center of the yoke, he admits that he intended to exert pressure. However, there is no evidence that he actually did exert pressure on the yoke. In the Board's view, respondent failed to do enough.

⁵Continental's DC-10 Flight Manual (Exhibit R-4) instructs that, "[i]n a typical approach, a representative pitch attitude is 5.0°....However, with a typical low rate of descent attitude, the pitch attitude will normally be 8°-9°...Landing with a 50° flap setting will decrease the pitch attitude approximately 1° in all cases...The tail will come in contact with the runway at a pitch attitude of...12.5°...."

⁶Respondent testified that he placed his open palm over the yoke, not because of a concern with the pitch attitude, but because the first officer asked him at that time, "where's the ground?" In our view this added fact lends more support to our conclusion that respondent was required, as pilot-in-command, to take immediate action to insure the safety of the aircraft.

Respondent admits that DC-10 pilots are instructed, and that he knew, that the deployment of the spoilers would result in an increased pitch attitude. However, he offers no explanation as to why, given this knowledge, he failed to act. He argues only that the responsibility to exert pressure on the yoke was that of the flying pilot, and, therefore, only the First Officer was careless. We disagree. Respondent, as pilot-in-command, had the overall responsibility to insure the safety of the aircraft and its passengers. Administrator v. Chapmen, 5 NTSB 1230 (1986). Moreover, under the circumstances presented here, he had as much or perhaps even more knowledge⁷ than the First Officer that immediate action was necessary to prevent an increase in pitch attitude. Having failed to take action, however, his inaction can only be viewed as was careless under section 91.9.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The Administrator's order and the initial decision are affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷Respondent testified that the First Officer was concentrating on the picture "outside" during the descent, while he was concentrating on the instruments.